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June 4, 1993

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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of Sections of the
Cable Television Consumer
Protection and Competition Act of
1992 - Rate Regulation, MM Docket
No. 92-266

Dear Mr. Searcy:

Enclosed on behalf of InterMedia Partners, are the original and four copies of InterMedia's Petition for Stay in the above-referenced proceeding. Attached to this Petition are Declarations containing facsimile signatures. The original signatures will be filed with the Commission as soon as they are received by this office.

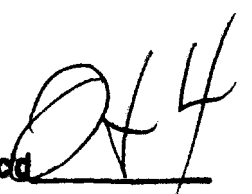
Please address any questions concerning this Petition to the undersigned.

Sincerely yours,


Stephen R. Ross

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Enclosure

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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JUN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992

Rate Regulation

MM Docket No. 92-266

PETITION FOR STAY

Stephen R. Ross
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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Rate Regulation Without Cost of Service Showing Standards Creates a Dilemma for Cable Operators	3
III. A Stay of the Report & Order is Required	8
A. Implementation of These Regulations Without Cost of Service Standards Will Cause Irreparable Harm to InterMedia	9

SUMMARY

InterMedia Partners hereby submits this Petition for Stay of the Commission's cable television rate regulations on the grounds that implementation of these regulations on June 21, 1993, without cost of service standards in place, constitutes an arbitrary and capricious action on the part of the Commission. InterMedia requests a stay of the benchmark rate regulations until the Commission completes its rulemaking on cost of service standards.

As set forth herein, cost of service showings are an essential part of the Commission's overall regulatory scheme governing cable television rates. Implementation of the benchmark provisions alone, without uniform cost of service standards adopted by the Commission, violates the specific provisions of the 1992 Cable Act in which Congress directed the FCC to account for cable operators' direct, and joint and common costs, and to prescribe a rate of return.

Implementation of these regulations without providing InterMedia the ability to provide meaningful cost of service showings to the franchise authorities and the Commission, will cause InterMedia irreparable harm for which there is no adequate legal remedy. In addition, grant of this request for stay will not harm other interested parties, and will serve the public interest.

Should the Commission grant this request for stay, InterMedia proposes that the Commission continue its freeze on cable television rates during the pendency of the Commission's

rulemaking on cost of service standards. If the freeze continues past January 1, 1994, InterMedia proposes that frozen rates be adjusted for inflation and other external costs.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
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Protection and Competition)
Act of 1992)
)
Rate Regulation)

MM Docket No. 92-266

PETITION FOR STAY

InterMedia Partners, L.P. ("InterMedia"), by its attorneys, hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to 47 C.F.R. Sections 1.43 and 1.44 for a stay of the Commission's Report & Order, FCC 93-117, released May 3, 1993, in the above-referenced proceeding.

On May 3, 1993, the Commission informed cable operators that it had adopted a "benchmark" method of rate regulation pursuant to the requirements of the 1992 Cable Act ("the Act"). Under the FCC's benchmark regulation, cable operators must make complex calculations using the FCC's worksheets to determine its base rate per channel. This base rate per channel is compared to the FCC's benchmark tables set forth in the Report & Order. If the operator's rates are at or below the benchmark, its rates are presumptively lawful.

Rates above the benchmark are presumed to be unlawful. In this case the operator has two options. Under the first option, the operator must rollback its rates to those in effect on September 30, 1992. If the September rates are still above the benchmark, then the operator must reduce its rates by an additional 10% or to the benchmark, whichever reduction is less. The second option allows the operator to keep its current rates in effect while it attempts to justify them through a cost-of-service showing. However, the Commission has not adopted any cost-of-service standards for such showings. Rather, these standards will be adopted pending the outcome of the future NPRM.

Further, the Commission's benchmark rates are intended to be "tier-neutral." It is a common circumstance that one tier of service may exceed the benchmark, although its overall rates are within the benchmark. Compliance with the benchmark formula adopted by the Commission requires many operators to re-tier so that rates for all tiers are consistent with the new rate

requirements. In recognition that such re-tiering is necessary, the Commission preempted local franchise requirements and other local laws that require cable operators to provide 30 days notice of rate changes so that operators could comply with benchmark levels by June 21, 1993.² Because of the tremendous backlog of equipment orders placed by cable operators all around the country that are attempting to re-tier by June 21, the equipment necessary to re-tier is not available. InterMedia cannot obtain and install all of the necessary equipment by June 21. See, Declaration of Ron Kirkeeng, attached as Exhibit 3.

As stated more fully herein, InterMedia submits that implementation of the Commission's Report & Order without uniform cost-of-service standards is arbitrary and capricious, would cause InterMedia irreparable injury, and is not in the public interest.

II. Rate Regulation Without Cost of Service
Showing Standards Creates a Dilemma for Cable
Operators

The FCC's benchmark tables are based on revenue data received by the Commission pursuant to its survey of cable system rates. As the Commission is well aware, the benchmark rate will not always adequately compensate the operator for its costs. The Commission recognizes that application of the benchmark rate, in some instances, would be unfair to the operator.

[W]e cannot be certain that the initial capped rate defined through benchmark comparisons will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. We do not believe that Congress intended that cable operators could, or should, be compelled to provide basic service tier service at rates that do not recover such costs. . . . Accordingly, we believe that it is acceptable to permit cable operators to exceed the capped rate if they can make the necessary cost showing in certain circumstances.

Report & Order at ¶ 262. The Commission's statement is, in essence, a recognition that cable operators, as all rate regulated entities, are entitled to a fair rate of return on their investment. This is consistent with the Supreme Court's standard for determining whether a rate is reasonable. A rate that is "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" and "commensurate with return on investments in other enterprises having corresponding risks" is reasonable. FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). The right of cable operators to submit cost of service showings is essential to this standard. Reliance on the benchmark alone cannot insure that operators will be able to attract capital and lines of credit.

Under traditional ratemaking principles, the essential elements of rate of return regulation "requires determinations relating to four major cost components: rate base; cost of capital; depreciation; and operating expenses." Id. at ¶ 265. To these cost components, an operator is entitled to add the prescribed rate of return. The Commission's Report & Order does not identify which

costs may be included in the rate base, nor has it stated which costs may be recovered as operating expenses.³ Indeed, the Commission emphasized that "cost accounting and cost allocation requirements can significantly affect rates and the way cable operators currently conduct business." Id. at ¶ 558. Nevertheless, such requirements are not specified. In addition, the Commission has not identified a "reasonable" rate of return, has not indicated how cost of capital should be calculated, and has not given a single clue as to how depreciation should be reflected.⁴

The Commission has stated that until its cost of service standards are adopted, an operator must submit a cost of service showing to the franchise authority if it desires to maintain existing rates above the benchmark. Franchise authorities may "prescribe any rate that is justified by the cost showing, including a rate lower than the benchmark or the operator's current rate level." Id. at ¶ 273 (emphasis added). Without any standards to follow, the public operator "assumes the risk that its rate could

Cost allocation and accounting standards are crucial to the ratemaking process, and the Commission has acknowledged that the record in this proceeding lacks any concrete information on which to base cost of service standards. In addition, the FCC historically has calculated a rate of return based on averaged, industry-wide data on cost of capital.⁵ Adoption of a single, industry-wide rate of return is crucial for ensuring that all cable operators are treated fairly, and to avoid multiple authorized rates of return set by franchise authorities. Allowing franchise authorities the interim power to determine standards to review cost of service showings, and prescribe a rate of return, will virtually guarantee the multiplicity of standards and confusion that the FCC specifically stated it intends to avoid by requiring franchise authorities to comply with federal, uniform standards. *Id.* at ¶ 270.

Nevertheless, the Commission expects InterMedia to make a reasoned business decision whether to rollback above-benchmark rates to the benchmark, or submit cost of service showings for which the Commission has yet to develop standards or rules. If InterMedia chooses to apply the benchmark table to its rates, then rates will be reduced, at most, to 10% below the rates in effect on September 30, 1992. If InterMedia pursues a cost of service showing before the local franchise authority, there is no way for

⁵ See, e.g., Authorized Rate of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 59 Rad. Reg. 2d (P&F) 651 (1985) aff'd. 60 Rad. Reg. 2d (P&F) 1561 (1986); Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd. 7505 (1990).

InterMedia to anticipate which of its basic tier costs will be determined by the franchise authority to be recoverable or what rate of return will be deemed reasonable. The franchise authority could order a rate reduction well in excess of 10% below September 30 levels. While cable operators may seek FCC review of franchise authority decisions, which the FCC will review on a "case-by-case basis," this ad hoc approach does not assist cable operators in

rate of return would give operators the ability to provide meaningful cost of service showings, and weigh the costs and benefits of either complying with the benchmark rate or seeking a cost of service justification. The effect of either type of rate reduction would jeopardize InterMedia's ability to fund system upgrades and rebuilds, which are franchise requirements, as well as impair InterMedia's ability to obtain bank financing. See, Declarations of David G. Rozzelle, Esq. and Karen J. Linder, attached as Exhibits 1 and 2.

The Commission concedes that application of the benchmark

**A. Implementation of These Regulations
Without Cost of Service Standards Will
Cause Irreparable Harm to InterMedia**

InterMedia operates approximately 19 cable system groups throughout the United States. A number of these system's current rates exceed the FCC's benchmark rate. Nevertheless, InterMedia believes that its current rates are justified based on its costs. As shown below, implementation of the Commission's rate regulations in their current form will cause InterMedia irreparable harm for which there is no adequate legal remedy.

In franchise areas where InterMedia's rates are above the benchmark, InterMedia must, pursuant to the FCC's Report & Order, either reduce its rates up to 10% below September 30 levels, or

uncompensable monetary loss; InterMedia cannot recover lost revenues from the franchise authority or its subscribers.

On the other hand, InterMedia cannot produce a meaningful cost of service showing because there exists neither standards nor a prescribed rate of return related thereto. If InterMedia cannot produce a cost of service showing and maintains its existing, justifiable rates, it will be in violation of the Commission's Report & Order, and the Communications Act of 1934, as amended.⁶ Violation of an Order of the FCC, or the Communications Act is the basis for revocation of InterMedia's franchises. Again, InterMedia is faced with the potential destruction of its business in certain franchise areas. In addition, InterMedia risks enforcement action and potential fines and forfeitures imposed by the FCC if it fails to submit a cost of service showing to justify above-benchmark rates.

InterMedia's harm is direct and immediate, not merely speculative. On June 21, 1993, local franchise authorities may file requests for certification with the FCC. As early as July 21, certified franchise authorities will require InterMedia to submit its rate schedule on FCC Form 393, which will identify whether rates are below or above the benchmark. At that time, InterMedia must either make rate reductions that will be confiscatory and unlawful in certain franchise areas, or face the potential loss of its franchise and risk prosecution by the FCC for failing to produce a cost of service showing.

⁶ 47 U.S.C. §§ 501, 502, 503 (1993).

The dilemma which InterMedia faces is sufficient grounds for a stay. Where a party is placed in the position of either complying with an agency's rule that places substantial costs on that party, or follow their present course of action (which they believe is lawful) and face prosecution, a stay is warranted. See, Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967); South Carolina Electric & Gas Co. v. I.C.C., 734 F.2d 1541 (D.C.Cir. 1984). InterMedia's position is no different than that of the petitioners in Abbott Laboratories who were forced to choose between incurring substantial costs to comply with the drug labeling requirements, or continue to use a type of label that "they believe in good faith meets the statutory requirements" and risk prosecution. Here, InterMedia believes in good faith that its existing above-benchmark rates are justified by its costs, and its present course of action is lawful. InterMedia should not be forced to choose between confiscatory rate reductions, and fear of prosecution and loss of its franchise because it is unable to produce a meaningful cost of service showing.

**B. The Likelihood of Success on the Merits
is Substantial**

**1. The Commission's Rate Regulations Do
Not Meet the Requirements of the
1992 Cable Act**

The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to "ensure that rates for the basic service tier are reasonable." Section 623(b)(1). In doing so, Congress directed the FCC to consider seven factors, including:

(1) "the direct costs of obtaining, transmitting, and otherwise providing signals"; (2) "such portion of the joint and common costs (if any) of obtaining, transmitting and otherwise providing such signals"; and (3) "a reasonable profit." Section 623(b)(2)(C). None of the above factors is accounted for in the Commission's benchmark formulas. The benchmark tables are based solely on corporate revenue data gathered by the FCC in its cable television

particular characteristics and configuration of the cable system.

Cable Television Consumer Protection and Competition Act of 1992, H.Rept. No. 102-628 at p. 82. Accordingly, the Committee stated that

[t]he formula the Commission shall establish pursuant to this section must take into account the direct cost of obtaining, transmitting, and otherwise providing signals required on the basic tier and the portion of the properly allocated joint common costs of the cable operator incurred in providing the basic service tier.

Id. The Commission's failure to follow Congress' directive to account for these specific cost factors, and to prescribe a rate of return invalidates the Commission's regulations. In reviewing an agency's construction of a statute, the first question is:

whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 842-43 (1984). The situation here is no different from American Civil Liberties Union v. F.C.C., 823 F.2d 1554 (D.C.Cir), cert. denied, Connecticut v. F.C.C., 485 U.S. 959 (1987). There, the Circuit court rejected the FCC's definition of "basic cable

service" which differed from the 1984 Cable Act's definition.⁸ The Court observed that:

the statute speaks with crystalline clarity. It provides a precise definition in section 602(2) for the exact term the Commission now seeks to redefine. The statute in no wise indicates that the 602(2) definition is only transitory. From the face of the statute then, we are left with no ambiguity and thus no need to resort to legislative history for clarification.

823 F.2d at 1568. In the 1992 Cable Act, Congress clearly and unequivocally addressed the precise issue. It directed the Commission to account for both direct costs, and joint and common costs in promulgating rate regulations, and to prescribe a "reasonable profit" or rate of return. It is obvious from the Commission's Report & Order that cost of service showings are intended to account for these factors, and that the Commission will in the future prescribe a rate of return. In addition, there is no indication in the statutory language or in the legislative history that Congress intended the Commission to prescribe what amounts to "interim procedures" at variance with the statute's specific directives. Therefore, until the directives of Congress are satisfied, the regulations in their present form are invalid.

⁸ Section 602(2) of the 1984 Cable Act defined "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." In contrast, the FCC defined this term as "the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast signals . . . and the public educational and governmental channels, if required by the franchise authority."

**2. The Commission's Action is Arbitrary
and Capricious**

Congress expressly delegated to the FCC the task of promulgating rate regulations within the parameters discussed above. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., supra, 467 U.S. at 844. In addition, an agency action that is arbitrary and capricious also violates the Administrative Procedures Act ("APA") and cannot stand. 5 U.S.C. § 706(2)(A). The Report & Order is arbitrary and capricious on its face. The validity of the Commission's entire benchmark regulatory scheme relies on the ability of cable operators to justify above-benchmark rate through cost of service showings. However, the Commission provides no vehicle for operators to do so. Instead, the Commission has delegated to the local franchise authorities what it could not do, namely, develop and apply cost of service standards. This is manifestly contrary to Congress' express delegation of this task to the FCC, and not to the local franchise authorities.

The Commission, which is the foremost authority on telecommunications rate regulation, was unable in the rulemaking proceeding below to develop standards on cost of service showings. The Commission stated:

[T]he record concerning cost of service for cable service generally is not sufficient to permit the crafting of detailed cost of service standards . . . we are unable to gauge at this time the extent to which general disallowances of debt incurred to purchase cable system in excess of replacement cost

would affect the industry and consumers. Similarly, we do not have information on the impact of particular depreciation and amortization schedules for different categories of equipment. Nor do we have adequate information on the optimum level of cost averaging. We also do not have significant information on the cost of providing cable service.

Report & Order at ¶ 271. Even if the Commission's delegation of its duty to determine cost of service standards was within its discretion, which InterMedia submits it was not, how can the franchise authorities be expected to do what the FCC could not do?

Furthermore, the Commission has very clearly articulated its rationale why it will adopt federal, uniform standards for cost of service showings which must be followed by all local franchise authorities. Uniform cost of service standards will promote administrative efficiencies, enable the Commission to balance the interests of consumers and investors and avoid multiple cost of

needs of consumers with those of cable operators. Id. at ¶ 270. The Commission's prescribed interim procedure to allow franchise authorities to determine cost of service standards is exactly contrary to its stated goal of adopting fair, uniform standards.

An agency rule is arbitrary and capricious if that agency:

has failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual, 463 U.S. 29, 43 (1983). Here, the FCC, relying on its vast experience in the rate regulation area, determined from the facts available to it that uniform cost of service standards are necessary to balance competing interests. Without explanation, the FCC then authorizes franchise authorities to create ad hoc cost of service standards, with no specified rate of return. Such action runs counter to the evidence available to the agency, and is implausible.

Again, the Commission's interim approach is similar to its actions in American Civil Liberties Union, supra, where the Court rejected the Commission's implausible exclusion of lock box controls for PEG and must-carry channels. 823 F.2d at 1579. On this issue, the Court stated:

[t]he FCC makes only a faint-hearted attempt

inclined to construe this record as an implicit concession by the agency that it cannot justify the exclusions.

Id. The Commission in the instant proceeding has made no explanation or justification as to why it abandoned the requirement for a single set of uniform standards, even if only for an interim period. As noted above, the Act specifically directs the Commission to establish these standards, and it has not yet done so. Accordingly, the Commission's interim proposal to allow franchise authorities unlimited discretion in reviewing cost of service showings is fundamentally arbitrary and capricious, and a stay is warranted.

C Grant of Stay Will Not Harm Other

between 120 and 180 days to determine whether an operator's rate is consistent with the benchmark standards or that its cost of service showing justifies its existing rates. Id. at ¶ 121. Thus, whatever benefits subscribers may receive may not be realized in any event until 180 days after the franchise authority receives the cable system's rate schedule.¹⁰ If the franchise authority is certified on July 21, 1993 (the earliest possible date), franchise authority may take up to 210 days from July 21 to review the rates and issue a decision.¹¹ Therefore, a stay of these rules will not cause any harm to subscribers, only a possible delay in the receipt of a benefit to a minority of subscribers.

On the other hand, grant of this stay will spare cable operators, franchise authorities and the Commission from the futile exercise of preparing and reviewing essentially meaningless cost of service showings. The Commission's resources are already being tested in order to implement the other sections of the Act. Most importantly, InterMedia and other similarly situated cable operators will be spared irreparable harm. As noted above,

¹⁰ Under the Commission's rules, once the franchise authority is certified, it must notify the cable system that it is certified and has adopted regulations consistent with the Commission's regulations. Id. at ¶ 87. Then, the cable operator has 30 days to file its rate schedule on Form 393, including any cost of service showing. Thus, the franchise authority has up to 180 days from the receipt of the cable system's Form 393 to make a rate determination.

¹¹ InterMedia is not requesting that the Commission stay its regulations governing the franchise certification process. InterMedia believes that franchise authorities should, if they desire, pursue their certifications as provided in the Report & Order. InterMedia is requesting only that the remaining portions of the Report & Order be stayed.

InterMedia's harm is not compensable. In contrast, the FCC and the franchise authorities have the power to order rate refunds and other remedial measures to compensate subscribers.